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No. 543

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

VITO GENOVESE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit denying a timely petition to rehear its order which affirmed an order of the District Court denaturalizing petitioner.

OPINIONS BELOW

The Court of Appeals denied our petition to rehear without opinion. Its opinion affirming the District Court's order of denaturalization is not yet reported, but is printed as the appendix to this petition. The District Court's opinion, reported at 133 F. Supp. 820, is set forth at R. 11a-32a.

JURISDICTION

The judgment of the Court of Appeals denying our petition to rehear was entered September 18, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner was naturalized as a citizen of the United States some twenty years ago in 1936. Respondent seeks to take away his citizenship on the asserted ground that petitioner in the course of his naturalization was asked about arrests and falsely denied ever being arrested. Both naturalization examiners who interviewed petitioner prior to his becoming a citizen in 1936 are dead. At the trial in this proceeding, petitioner admitted a record of arrests but denied under oath that he had been asked about arrests in his naturalization proceeding. One of his naturalization witnesses, a municipal judge testified in petitioner's behalf and confirmed that no question concerning arrests had been asked. Petitioner and the judge were the only direct witnesses alive and locatable after twenty years. In addition, four character witnesses, all reputable citizens in petitioner's community, attested petitioner's good reputation for truth and veracity. The only testimony supporting the denaturalization of petitioner is that of a naturalization examiner who admittedly had nothing to do with petitioner's naturalization. He testified that a regulation required inquiry concerning arrests, and that in practice symbols found on petitioner's application were not placed on an application unless such inquiry had been made and negatively answered. On these undisputed facts, the following questions are presented:

1. Did respondent prove its case for taking away citizenship by clear, unequivocal, and convincing evidence which does not leave in doubt the issue of whether petitioner was asked concerning arrests; or, putting the same question somewhat more broadly, can a citizen of the United States lose his citizenship on an inference based on a presumption of regularity arising from testimony as to rule and practice.

2. Assuming that petitioner was asked about arrests and falsely denied having been arrested, would such denial constitute fraud warranting denaturalization when in fact the revealing of his criminal record would not have barred him from naturalization.

3. Assuming that petitioner was asked about arrests and falsely denied having been arrested, can such denial, even though not material in inducing a grant of citizenship, be taken now to show a lack of good moral character at the time of naturalization and thus warrant the taking away of citizenship as illegally procured.

STATUTE INVOLVED

Section 338(a) of the Nationality Act of 1940 [8 U.S.C. 738(a)] provides as follows:

> It shall be the duty of the United States district attorneys for the respective districts, upon affidavits showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such persons to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

STATEMENT

This is a denaturalization proceeding initiated by respondent under Section 338(a) of the Nationality Act of 1940. The provisions of that section have been substantially carried over into our present law, the Immigration and Nationality Act, Section 340(a), 66 Stat. 260.

Petitioner was naturalized as a citizen of the United States in 1936, R. 2a. Respondent's complaint (R. 2a-6a), filed in 1952, seeks, so far as now material, to take away that citizenship on allegations that petitioner in the course of his naturalization had been asked concerning arrests and had falsely denied having any arrest. Petitioner by sworn answer (R. 8a) and sworn testimony at the trial in the District Court (R. 222a-223a) denied that he had been asked concerning arrests. In his testimony, petitioner admitted having had a criminal record which, as is undisputed, would not have barred him from naturalization had it been known. R. 223a, 25a. One of his witnesses at naturalization, a municipal judge, confirmed that petitioner was not asked concerning arrests, R. 272a, 273a, 276a, and 284a-285a. Four citizens, all reputable and qualified witnesses, attested petitioner's good reputation for truth and veracity. R. 285a, 291a, 294a, and 296a.

The respondent's reliance was solely on symbols on petitioner's application form, plus the statement of a naturalization examiner, unconnected with the questioning of petitioner at naturalization, that a regulation required inquiry concerning arrests and that the type of symbols found on petitioner's application form would not, in practice, have been placed on a

form unless inquiry concerning arrests had been made and a negative answer obtained. R. 44a.

The District Court found that the respondent had "sustained its burden by clear, unequivocal and convincing proof" (R. 22a) that petitioner had been asked concerning arrests and had falsely denied having been arrested. The fact that petitioner's criminal record would not have barred naturalization, even if known, did not, in the opinion of the District Court, prevent denaturalization for fraud (R. 23a-26a). The Court was of the further opinion that petitioner's naturalization should be taken away as illegally procured because a false denial of arrests, even though not material, shows a lack of the good moral character requisite for naturalization (R. 27a-R. 28a).

The Court of Appeals (see its opinion in the appendix to this petition) recited that it "should affirm only if the [record contains] clear, unequivocal, and convincing evidence which does not leave the issues of fraud or illegality in doubt," and with little discussion of the facts approved the District Court on all grounds.

A petition to rehear en banc was denied.

REASONS FOR GRANTING THE WRIT

1. The Court Below Decided the Federal Question of Petitioner's Denaturalization in a Way in Conflict With Applicable Decisions of This Court, and Its Decision Is in Conflict With Decisions of the First and Second Circuit Courts of Appeal

This Court exacts an extremely heavy burden of proof from the Government as requisite for the degrading of a citizen to the status of an alien. Denaturalization must be based on "clear, unequivocal,

and convincing evidence which does not leave the issue in doubt." See *Schneiderman* v. *United States,* 320 U.S. 118, 158; *Baumgartner* v. *United States,* 322 U.S. 665, and *Knauer* v. *United States,* 328 U.S. 654. The imposition of such a burden in securing denaturalization can hardly allow of a denaturalization of your petitioner that rests only on an inference based on a presumption of regularity. Testimony as to rule and invariable practice does not suffice to establish the happening of an event even in civil actions where only a preponderance of the evidence is required. See, for example, *Masters* v. *United States,* 229 F. (2) 677 (C.C.A. 6, 1956); *Barry* v. *Hall,* 98 F. (2) 222 (C.C.A.D.C., 1938); *United States* v. *Barnette,* 91 F. (2) 10 (C.C.A. 5, 1937). And to presume that a Government employee (or any employee, or anyone, for that matter) always did what he was supposed to do is to ignore experience.

The Court of Appeals correctly states the *Schneiderman-Baumgartner-Knauer* rule on the burden of proof for denaturalization. Yet its decision allows the denaturalization of petitioner on the basis that petitioner must have been asked concerning arrests because, as one naturalization examiner testified, that is what the regulation required and that is what was always asked. The sworn testimony of two direct witnesses (petitioner and the municipal judge who was at his naturalization examination) and the four witnesses attesting petitioner's truth and veracity availed not—even for raising a doubt on the issue whether petitioner was asked concerning arrests. The decision of the Court of Appeals, so based, cannot reasonably be squared with *Schneiderman, Baumgartner,* and *Knauer.* The First Circuit Court of Appeals on

facts not materially different from ours could not find that the Government had carried its burden of showing that the question concerning arrests had been asked when there was nothing to oppose the Government's testimony of regular practice, except the citizen's statement of "no recollection of being asked about arrests." *Cufari* v. *United States,* 217 F. (2) 404 (C.C.A. 1, 1954). The decision of the Court of Appeals here conflicts directly and squarely with the decision of the First Circut Court of Appeals in *Cufari.* If both decisions continue to stand, Cufari will remain a citizen and Genovese will be an alien subject to risk of deportation because Cufari lives in Massachusetts in the First Circuit and Genovese in New Jersey in the Third, all other circuits in the United States being, as yet, neutral on the point. In avoidance of precisely such unseemly results does the writ of certiorari lie.

On another issue, the decision of the Court of Appeals conflicts with the decision of the Court of Appeals for the Second Circuit in *United States* v. *Bischof,* 48 F. (2) 538, 539, (C.C.A. 2, 1931). Here (in the Court of Appeals below) it is held that a false statement as to arrests in the course of naturalization warrants denaturalization now for lack of the good moral chacter requisite at the time of naturalization. There (in the Second Circuit) it is held in *Bischof* that the issue of good moral character is settled by the naturalization decree and cannot be reopened for the purpose of denaturalization.

2. The Court Below Decided an Important Question of Federal Law Which Has Not Been, But Should be Settled by This Court

The Court below holds that a knowingly false denial of arrests sufficies for a showing of fraud warranting denaturalization even though a truthful answer and consequent inquiry thereon would have disclosed no bar to naturalization—in other words, that fraud for denaturalization requires no showing that anyone was defrauded. A holding, so dubious even in the general law of fraud, and so broadly important in citizenship law, deserves, we suggest, the Court's review.

CONCLUSION

The Court should grant this petition in order to bring the decision below in line with its own decisions, to resolve the conflicts existing between the decision below and the decisions of the First and Second Circuits, and to settle the important question of federal law presented.

Respectfully submitted,

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